No. 92-97

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

WILLIAM KANTER
CHRISTINE N. KOHL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

STEPHEN H. KAPLAN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
Department of Transportation
Washington, D.C. 20590

JOHN H. CASSADY
Deputy Chief Counsel

BARRY L. MOLAR
Attorney
Federal Aviation Administration
Washington, D.C. 20590

QUESTIONS PRESENTED

1. Whether there is an implied private right of action under the Anti-Head Tax Act, 49 U.S.C. App. 1513(b), or a right of action under the Commerce Clause, that would allow airlines to proceed directly in federal court to challenge the reasonableness of airport user fees.

2. If any such right exists, whether the user fees charged to petitioners are reasonable under federal law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued:

Cases – Continued:

Constitution, statutes and regulations:

Statutes and regulations – Continued: Page

Statutes and regulations – Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Secretary of Transportation has primary responsibility for the administration and enforcement of federal laws relating to the Nation's airways and airports, including the Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*, the Anti-Head Tax Act, 49 U.S.C. App. 1513, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201 *et seq.* In administering the comprehensive federal regulatory scheme in this area, the United States has an important interest in ensuring that national standards are developed and applied clearly, uniformly, and in a manner consistent with overall federal policy. In addition, the United States has an interest in the proper development of the law concerning implication of private rights of action under federal statutes, to ensure that such rights will be found only where consistent with

congressional intent and after taking proper account of administrative considerations. The United States filed a brief at the petition stage at the invitation of the Court.

STATEMENT

Petitioners are seven airline carriers that brought suit in federal district court claiming that respondent Kent County International Airport charges unreasonable and discriminatory user fees in violation of federal aviation laws, in particular the Anti-Head Tax Act, 49 U.S.C. App. 1513(b).[1] Petitioners also argue that the user fees violate the Commerce Clause of the Constitution. The court of appeals rejected both claims.

1. Congress has enacted a comprehensive scheme of federal regulation and oversight of the Nation's airways and airports. The Federal Aviation Act of 1958 (FAA) generally preempts state regulation of air carrier "rates, routes, or services," while preserving the authority of States and political subdivisions to exercise "proprietary powers and rights" as airport owners and operators. 49 U.S.C. App. 1305(a)(1) and (b)(1). One Section of the FAA, known as the Anti-Head Tax Act (AHTA), prohibits state and local governments from imposing direct or indirect taxes on "persons traveling in air commerce."[2] 49 U.S.C. App. 1513(a) (Supp. III 1991). The AHTA excludes from its prohibition, however, "reasonable rental charges, landing fees, and other service charges [collected]

[1] Pertinent provisions of Section 1513 and of certain other statutes discussed below are set forth in the Appendix to this brief.

[2] The AHTA was enacted in response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), which sustained a $1 service fee imposed on each commercial airline passenger flying out of the airport. See S. Rep. No. 12, 93d Cong., 1st Sess. 17 (1973).

from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(b). The Secretary of Transportation is authorized to carry out the provisions of the FAA by, *inter alia*, investigating complaints of violations of the Act, conducting administrative proceedings, issuing remedial orders, and bringing enforcement actions in federal district court. See 49 U.S.C. App. 1354(a), 1482(a), 1487(a) (see App., *infra*, 6a-9a); see also 14 C.F.R. Pt. 13.

The Airport and Airway Improvement Act of 1982 (AAIA) complements the FAA and AHTA. The AAIA requires the Secretary to formulate a national airport system plan, one purpose of which is to ascertain airport development needs. 49 U.S.C. App. 2203 (1988 & Supp. III 1991). The statute also provides federal funds for airport development through a federal Airport and Airway Trust Fund and other sources. 49 U.S.C. App. 2204 (1988 & Supp. III 1991); 26 U.S.C. 4261, 9502. The Secretary may approve an application seeking a grant of federal funds for an airport development project only if the airport provides specified written "assurances," including that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that "each air carrier * * * shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation * * * as are applicable to all such air carriers which make similar use of such airport." 49 U.S.C. App. 2210(a)(1) (see App., *infra*, 4a-5a). The owner or operator must also promise to "maintain a fee and rental structure * * * which will make the airport as self-sustaining as possible," and to use "all revenues generated by the airport * * * for [its] capital or operating costs."[3] 49 U.S.C. App. 2210(a)(9) and (12).

[3] The AAIA authorizes the Secretary to prescribe requirements and conduct investigations to ensure compliance with the assurances pro-

2. Respondents charge petitioners landing and aircraft parking fees for their runway use, rent for the terminal space they occupy, 100% of respondents' cost of providing "crash, fire, and rescue" (CFR) services, and amortization fees for assets acquired by the airport. Pet. App. 28a; *id.* at 14a-15a. Respondents also charge general aviation (corporate and private aircraft) a "fuel flowage fee," and charge concessions (restaurants, parking lots, etc.) a percentage of their gross receipts. *Id.* at 25a, 29a. The revenues generated from the concessions substantially exceed the concessions' allocated costs, and thus yield a sizable surplus. The surplus is used to offset shortfalls occurring in other areas or placed in the airport's reserve fund. *Id.* at 9a, 29a.

Petitioners filed suit in the district court seeking a declaratory judgment that the landing fees, terminal rental rates, and other charges assessed by respondents as of April 1988 were unreasonable and thus unlawful under the AHTA and the AAIA, and that they imposed an undue burden on interstate commerce in violation of the Commerce Clause. Pet. App. 24a, 47a-48a. Petitioners contended that respondents' rate methodology resulted in unreasonable rates and profits that greatly exceeded the airport's costs. Petitioners also argued that surplus revenues generated from the fees paid by concessions should be "cross-credited" to petitioners so as to reduce the latter's fees. Finally, petitioners claimed that respondents undercharged noncommercial aviation users in several respects, thereby discriminating in favor of primarily local traffic. *Id.* at 30a.

3. The district court first held that petitioners had no implied right of action to challenge respondents' user fees

---

vided by airport project sponsors. 49 U.S.C. App. 2210(b), 2218(a). The Secretary's regulations in 14 C.F.R. Pt. 13 governing administrative proceedings under the FAA also apply to investigations and enforcement actions under the AAIA.

under the AAIA, but did have such a right under the AHTA. Pet. App. 44a-46a. On the merits, the district court concluded that respondents' fees were reasonable under the AHTA. The court held that because the AHTA refers only to fees charged to "aircraft operators," it does not require cross-crediting of surpluses generated by concession fees in order to lessen the fees charged to petitioners. *Id.* at 32a, 36a. Reviewing those fees, the court found all but one (for aircraft parking) to be reasonable relative to the benefits conferred on petitioners. *Id.* at 37a-38a. It also rejected petitioners' claim that respondents' fee structure discriminated in favor of general aviation (*id.* at 38a), and held that in light of the congressional action represented by the AHTA, petitioners' fees were not subject to scrutiny under the dormant Commerce Clause (*id.* at 46a).

4. The court of appeals affirmed most of the district court's judgment, reversing and remanding (over one dissent) only for the proper allocation of CFR costs between petitioners and general aviation. Pet. App. 17a, 20a. The court first agreed with the district court that petitioners could assert an implied private right of action under the AHTA. *Id.* at 4a-5a. In addressing the reasonableness of respondents' fees under that statute, the court found that non-airline concessions are not within the scope of the statute (*id.* at 9a), and thus concluded that the surplus revenue generated by concession fees need not be cross-credited to reduce petitioners' charges. *Id.* at 10a. The court also determined that petitioners were allocated and charged their fair share of the airport's costs in connection with terminal and other public spaces, and that the amortization fees charged for the airport's capital assets were reasonable. *Id.* at 11a-12a, 14a-15a.

In addition, the court found no basis in the AHTA for altering the allocation of costs to general aviation, agree-

ing with the district court that respondents' policy of charging petitioners 100% of certain allocated costs but assessing general aviation users only 20% of their corresponding costs did not render petitioners' fees "unreasonable" under the AHTA because petitioners were not required to make up the difference. Pet. App. 17a-20a. Finally, the court of appeals declined to conduct an independent analysis of the challenged user fees under the Commerce Clause, again agreeing with the district court that in enacting the AHTA Congress had "established clear guidelines for the fees and rates" that airports charge, thus foreclosing review except for compliance with those federal guidelines. *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

1. There is no private right of action under the AHTA allowing petitioners to challenge the reasonableness of respondents' airport user fees. Nothing in the language, structure, or legislative history of the AHTA or related statutes permits the inference that Congress intended to create a remedy for unreasonable airport fees enforceable in the first instance by private actions in the federal courts. Instead, such complaints under the AHTA must be pursued initially in administrative proceedings before the Secretary, subject to judicial review in the courts of appeals. Moreover, as petitioners concede, the AHTA must be read in conjunction with the AAIA, which clearly commits to the Secretary the review of rate reasonableness and related questions. Finally, providing for initial determination of such questions by the Secretary is appropriate in light of the Secretary's expertise, regulatory authority and national policy perspective, and comports with traditional conceptions of the relative institutional roles of administrative agencies and the federal courts.

2. Similarly, because Congress has legislated on the specific subject of state airport user fees, in the context of a comprehensive federal scheme of airport and airway regulation, and has provided a federal administrative forum for the resolution of rate reasonableness issues arising under that scheme, judicial review of such fees under the dormant Commerce Clause is both unnecessary and inappropriate.

3. Because the Secretary has not had an opportunity to evaluate the parties' substantive positions in the course of an appropriate administrative proceeding, we express no definitive opinion on the merits of petitioners' claims. From a general review of the opinions and record in this case, however, it would appear that the lower courts' decisions on the merits comport with this Court's prior decisions and are generally consistent with federal statutory law and policy. Neither statutory law nor this Court's decisions require any particular fee structure or methodology, and the fees charged petitioners would generally be considered reasonable under federal law so long as they are not substantially higher either than respondents' own properly allocated costs or than the fees charged to other commercial carriers making similar use of the airport. On the basis of the record in this case, and without prejudging the outcome of any later proceeding before the Secretary, petitioners do not appear to have demonstrated that respondents' fees are unreasonable, or that they have been subject to unjust discrimination under the applicable federal law.

ARGUMENT

I. THE AHTA CREATES NO PRIVATE RIGHT TO CHALLENGE AN AIRPORT'S USER FEES DIRECTLY IN FEDERAL COURT

The threshold issue presented by this case is who should address, in the first instance, petitioners' complaints about

respondents' user fees: the courts or the Secretary.[4] Both

[4] Petitioners assert in their brief (Br. 19 n.18) that the private right of action issue is not properly before this Court; in their opposition to the government's motion for leave to participate in oral argument they contend (Opp. 4-5 & n.5) that the Court even lacks jurisdiction to address the issue, because respondents did not file a cross-petition for certiorari and a decision on the right-of-action ground would necessarily modify the judgment below in respondents' favor. We have responded to these arguments at some length in our reply to petitioners' opposition to our motion. It suffices to note here that while the Court may of course decline to decide the issue, and simply assume for purposes of this case that a cause of action exists (see *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 523 & n.3 (1991); *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1716 n.4 (1991)), there is no limitation on the Court's power that would prevent it from deciding the question in this case. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.35, at 384-387 (6th ed. 1986). Indeed, as recently reaffirmed in *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993), a court may always consider an issue " 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." Cf. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981) (grant of certiorari on certain issues poses no jurisdictional bar to consideration of other questions "necessary for the proper disposition of the case"); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 62-63 (1956) (issue of primary administrative jurisdiction not raised in parties' filings with the Court). Whether the AHTA authorizes private actions to challenge airport fees, without prior resort to the Secretary of Transportation, is surely such an antecedent and dispositive issue.

Moreover, affirmance by this Court on the ground that there is no private right of action would not modify the judgment below. The part of that judgment adverse to respondents (directing a reallocation of CFR costs) has become final, and this Court's decision will not alter that result, even if it undercuts the basis on which the decision below was reached. See *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487-488 (1934). In this Court respondents argue only for affirmance, on any ground, of that part of the judgment below that ran in their favor and that petitioners have brought before this Court for review. See *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

the district court and the court of appeals ruled that although petitioners had no private right of action under the AAIA, they could maintain their suit under the AHTA. Pet. App. 42a-46a; *id.* at 4a-6a. The latter decision is incorrect.

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court identified four factors bearing on whether the courts will recognize a private right of action to enforce a federal statute: whether the statute creates a federal right in favor of the plaintiff; whether there is any explicit or implicit indication of congressional intent on the subject; whether recognition of a private right would be consistent with the overall statutory scheme; and whether the action would more appropriately be left to state law. Since *Cort*, the Court has explained repeatedly that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," and that the first three factors identified in *Cort*—"the language and focus of the statute, its legislative history, and its purpose"—are useful primarily in pursuing that inquiry. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979); see also, *e.g.*, *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1370 (1992).

Determining congressional intent "is basically a matter of statutory construction," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979), requiring consideration of the language, structure, and legislative history of the statute, and especially of its enforcement and remedial provisions. *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Unless the plaintiff can demonstrate that Congress's intent to create a cause of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential

predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. 77, 94 (1981); *Artist M.*, 112 S. Ct. at 1370.

The FAA, of which the AHTA is a part, and the AAIA establish a comprehensive and reticulated scheme of federal regulation of the Nation's airways and airports in general, and of airport user fees in particular. The language, structure and history of the relevant statutes provide no basis for inferring a congressional intent to allow private parties to enforce the AHTA's reasonableness provision directly in the courts. The legislative intention reflected in the statutory scheme is rather that complaints about a federally funded airport's user fees should be raised before and resolved in the first instance by the Secretary.[5]

---

[5] A few other decisions have concluded (or assumed) that airlines have a private right of action under the AHTA. See *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9, 15-16 (1st Cir. 1987); *Indianapolis Airport Auth.* v. *American Airlines, Inc.*, 733 F.2d 1262, 1265-1266 (7th Cir. 1984) (addressing the AHTA issue without analysis of implied-right issue); *City & County of Denver* v. *Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989) (implied right assumed without discussion); *Rocky Mountain Airways, Inc.* v. *County of Pitkin,* 674 F. Supp. 312, 314-316 (D. Colo. 1987); *Niagara Frontier Transp. Auth.* v. *Eastern Airlines, Inc.*, 658 F. Supp. 247, 249-251 (W.D.N.Y. 1987); *Island Aviation, Inc.* v. *Guam Airport Auth.*, 562 F. Supp. 951, 960 (D. Guam 1982); *American Airlines, Inc.* v. *City of Philadelphia,* 414 F. Supp. 1226 (E.D. Pa. 1976). In our view, those decisions mistakenly failed to appreciate the administrative remedy that Congress provided. See Note, *Airline Deregulation and Airport Regulation,* 93 Yale L.J. 319, 324 n.33 (1983) (suggesting appropriateness of regulatory review).

This Court has never addressed the issue. Although the Court has decided cases raising preemption claims under the AHTA, none of those cases involved a request for federal court adjudication of the reasonableness of fees under 49 U.S.C. App. 1513(b), and none discussed whether an implied private right of action existed. See *Western Air Lines, Inc.* v. *Board of Equalization,* 480 U.S. 123 (1987) (ruling on lawfulness of state tax under 49 U.S.C. App. 1513(d)); *Wardair Canada Inc.* v. *Florida Dep't of Revenue,* 477 U.S. 1 (1986) (preemption claim with respect to aviation fuel tax imposed on foreign air carrier); *Aloha Airlines, Inc.* v. *Director of Taxation,* 464 U.S. 7 (1983) (preemption challenge under 49 U.S.C. App. 1513(a) to tax on airline's gross revenues).

A. The pertinent language of the AHTA contains no reference to any enforcement mechanism, either in the courts or by the Secretary. It simply prohibits direct or indirect head taxes, and provides that state-owned or operated airports are not barred from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(a) (Supp. III 1991), (b). The court of appeals inferred, from the absence of any mention of the Secretary or an administrative enforcement scheme in Section 1513(a) or (b) itself, a congressional intent to allow a private cause of action directly in the courts. Pet. App. 5a. "But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross,* 442 U.S. at 571.

Indeed, the most that can be said on the basis of this statutory language is that Congress intended to benefit airline passengers—and incidentally, we may assume, commercial air carriers—by prohibiting head taxes and requiring user fees imposed on aircraft operators to be "reasonable." See *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987). That conclusion alone implies nothing, however, about how Congress intended the prohibition to be implemented, and in particular about what role it intended the courts to play. See *Virginia Bankshares, Inc.* v. *Sandberg,* 111 S. Ct. 2749, 2763-2764 (1991). The statutory language is simply inconclusive on the remedial issue.

B. The overall legislative structure cuts against the conclusion that Congress intended courts to determine, in the first instance, the statutory reasonableness of airline user fees. Congress added the AHTA to an existing statutory framework that already provided for administrative review of asserted violations. Moreover, the explicit remedial sections of the statute clearly indicate that almost all private claims, including those under the AHTA, are to be pursued initially through the administrative process. Finally, when Congress amended the AHTA recently to permit limited per passenger charges under certain circumstances, it explicitly committed oversight of the amount and use of those charges to the Secretary.

1. The AHTA was enacted as part of the Airport Development Acceleration Act of 1973 (ADAA), which added to the FAA a new Section 1113, now codified at 49 U.S.C. App. 1513(a)-(c). Pub. L. No. 93-44, § 7(a), 87 Stat. 90. The new state tax prohibition was deliberately incorporated into the FAA in order to take advantage of the existing statutory and administrative structure. As the Senate Legislative Counsel explained, amending the FAA, "under which the Federal Government exercises its authority * * * to regulate air transportation," was "the most appropriate method of exercising the authority to pre-empt State and local taxation of passengers engaged in air transportation in the interests of the needs and proper regulation of such transportation." S. Rep. No. 12, 93d Cong., 1st Sess. 25 (1973).

At the time the AHTA was enacted, the FAA authorized the Federal Aviation Administrator to conduct investigations, issue orders, and promulgate regulations necessary to carry out the provisions of that statute. 49 U.S.C. 1354 (1970). It also provided that any person could file a complaint with the Administrator "with respect to anything done or omitted to be done by any person in

contravention of any provisions of [the FAA], or of any requirement established pursuant thereto," subject to judicial review of any resulting order in the courts of appeals. 49 U.S.C. 1482(a), 1486(a) (1970). Virtually identical provisions exist within the FAA today. See 49 U.S.C. App. 1354(a), 1482(a), 1486(a) (reproduced at App., *infra*, 6a-7a).

The Secretary has promulgated regulations that establish procedures for adjudicating complaints of violations of the FAA, including the AHTA. 14 C.F.R. Pt. 13. Any person may file a complaint with the Administrator with respect to any matter allegedly done or not done in violation of the FAA. After receiving an answer to the complaint, the Administrator determines if an investigation or hearing into the matter is warranted. 14 C.F.R. 13.5; see also 14 C.F.R. 13.20. Any such hearing is conducted in accordance with rules typically followed in administrative proceedings.[6] See 14 C.F.R. 13.31-13.63. The Secretary has also established substantive guidelines and policies for determining whether airport user fees are in compliance with federal aviation laws. See pp. 25, 27, *infra*.

Thus, in 1973, Congress carefully added its new anti-head tax provisions to a long-established statutory structure that provided explicitly for administrative review of alleged violations—subject, of course, to judicial review of the administrative proceedings. 49 U.S.C. 1486(a) (1970); see 49 U.S.C. App. 1486(a). It seems highly un-

---

[6] Although rarely invoked, these procedures governed, for example, the administrative review of an AHTA-based challenge to landing fees at Boston's Logan International Airport. See *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 160 (1st Cir. 1989) (*Massport*) (noting the Secretary's institution of a proceeding to consider, *inter alia*, "whether the [airport's] new landing fee structure violates the Anti-Head Tax Act"). The Secretary ultimately concluded that the fees in question did not constitute head taxes. *Id.* at 170.

likely that in doing so it intended to create an anomalous right of immediate access to the district courts for factual development and legal determination of rate reasonableness issues that are within the unique competence of the agency otherwise charged with administering the existing statute—or that, if it intended such a counterintuitive result, it would have passed over the matter in statutory silence. See *Karahalios*, 489 U.S. at 532-533; *Middlesex*, 453 U.S. at 14-15; *Transamerica*, 444 U.S. at 19-20.

2. The explicit remedial provisions of the FAA further demonstrate that Congress intended no private right of action under the AHTA. Section 1007(a) of the Act, 49 U.S.C. App. 1487(a) (formerly 49 U.S.C. 1487(a) (1970)), generally empowers only the Secretary or the Attorney General to bring enforcement actions in a district court. The same Section authorizes "any party in interest" to seek direct judicial enforcement only in the case of Section 1371(a), relating to certificates of public convenience and necessity; in all other cases, the only provision for private action is the administrative procedure discussed above. Thus, the statute in the main denies private parties the right that petitioners assert here; and "when Congress wished to provide a private * * * remedy, it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. See 49 U.S.C. App. 1482. In the face of such structural evidence of congressional intent to limit private judicial remedies, courts should not easily be persuaded to find such remedies by implication where Congress has not explicitly provided them.[7]

[7] Similarly, in 1982, Congress added to the AHTA itself a provision prohibiting certain state taxes on "air carrier transportation property" that Congress has determined "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. App. 1513(d)(1). Section 1513(d)(1) was patterned on similar provisions in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, § 306, 90 Stat. 54, and the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823 (codified at 49 U.S.C. 11503(b) and 11503a(b)). See *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 131 (1987). The 4R Act and Motor Carrier Act provisions explicitly provide private rights of action to redress violations in federal district court. 49 U.S.C. 11503(c), 11503a(c). When Congress borrowed the anti-discrimination language of those laws for use in the AHTA, however, it left out the private remedy provision. That decision is not, of course, dispositive of congressional intent almost a decade earlier, when Section 1513(b) was enacted. But the obviously conscious congressional decision to exclude private judicial actions under Section 1513(d) suggests a similar legislative choice with respect to the earlier subsection.

3. Finally, in 1990, Congress amended the AHTA to permit imposition, under certain circumstances, of limited per capita "passenger facility charges" (PFCs) that would otherwise be prohibited head taxes. 49 U.S.C. App. 1513(e) (Supp. III 1991). PFCs must be approved by the Secretary, and used to finance eligible airport-related projects also subject to approval by the Secretary under specified federal policy criteria. *Ibid.* Air carriers are given the opportunity to participate in the approval process under regulations to be promulgated by the Secretary. 49 U.S.C. App. 1513(e)(11)(C) and (D) (Supp. III 1991). And if the Secretary determines that a PFC previously approved is excessive or that PFC revenues are not being used as the statute requires, the Secretary is authorized to deduct such amounts from federal funding otherwise payable to the airport under the AAIA. 49 U.S.C. App. 1513(e)(12)(C) (Supp. III 1991).

We agree with petitioners (Br. 15) that the enactment of Section 1513(e) "confirms Congress' continuing intention" to control airport user charges and "ensure that those charges are reasonable and are imposed and used only for necessary airport improvements." But that Section also explicitly confirms Congress's reliance *on the Secretary* to

evaluate the need for and reasonableness of airport user fees, in the context of an exception to the AHTA's general prohibition on per passenger charges. Precisely the same expertise and administrative capability are involved in the cost allocation and rate reasonableness determinations sought by petitioners in this case. Thus, when Congress had occasion to prescribe explicitly how such issues should be resolved, it committed them to the Secretary. That prescription confirms the decision implicit in the placement of the AHTA within the FAA structure, and argues strongly against the recognition of an inconsistent role for the district courts as factfinders and ratemakers under the closely related provisions of the same statute that are at issue in this case.

C. The legislative history of the AHTA is equally barren of support for the notion that Congress intended private parties to pursue statutory grievances through the courts, rather than through the administrative process. The committee reports contain no discussion regarding any enforcement mechanism, let alone a private right of action. S. Rep. No. 12, *supra,* at 17-26; H.R. Rep. No. 157, 93d Cong., 1st Sess. 2-3, 4-5, 10 (1973); H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. 5-6 (1973). See *Touche Ross,* 442 U.S. at 571. What the legislative history does reflect is Congress's intent to establish "a uniform national program of taxation and funding for airport improvements," which had already begun under the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Tit. I, 84 Stat. 219 (formerly codified at 49 U.S.C. 1701 *et seq.* (1970)), the predecessor to the AAIA. S. Rep. No. 12, *supra,* at 21. Indeed, the Senate Report stresses the role of the federal government as a major participant in airport development and financing. *Id.* at 25-26; see also Pet. Br. 10. Given the important and coordinating role that Congress obviously envisioned for the Secretary with respect

to such issues, a concomitant intent to allow private parties to ignore the Secretary's centralized expertise and take quintessentially administrative questions directly to federal district courts throughout the country seems implausible at best.

D. In addition, a private right of action to challenge the reasonableness of airport user fees would be incompatible with the AHTA's companion provisions in the AAIA, 49 U.S.C. App. 2201 *et seq.* The Department of Transportation advises us that virtually all of the Nation's airports serving commercial airlines have development projects funded at least in part under the AAIA, and therefore subject to the requirements described below. As petitioners concede (Br. 14, 29 n.33, 31), the two statutes must be read in conjunction.

The AAIA establishes a major direct role for the Secretary in the development and financing of the Nation's airports, and contains its own administrative and judicial review procedures. The Secretary approves federal funding for local airport projects only when their sponsors provide assurances that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that the rent and other fees charged to "air carriers" will be "nondiscriminatory." 49 U.S.C. App. 2210(a)(1) (see App., *infra,* 4a-5a). In addition, the fee structure must make the airport as self-sustaining as possible, and all revenues (from both carriers and airport concessions) must be used for the airport's capital or operating costs. 49 U.S.C. App. 2210(a)(9) and (12). If a project sponsor violates an assurance, the Secretary may investigate the matter at a hearing and, if warranted, withhold funding. 49 U.S.C. App. 2218(a), (b)(1). The same regulations that govern administrative proceedings under the FAA apply to such AAIA hearings. See 14 C.F.R. 13.3, 13.20, 13.31-13.63. A project sponsor may seek

appellate judicial review of a decision by the Secretary to withhold funding.[8] 49 U.S.C. App. 2218(b)(4).

Thus, under the AAIA, the Secretary is authorized to assess whether an airport's user fees are reasonable, not unjustly discriminatory, and put to proper purposes. Creating still another right of action under the AHTA for airlines to challenge the same fees directly in the district courts therefore would undermine the Secretary's role under the AAIA, and create confusion and the potential for a variety of conflicting decisions, often rendered without the benefit of the Secretary's unique perspective and expertise. See, *e.g.*, *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 158-159 (1st Cir. 1989) (*Massport*) (discussing confusion caused by parallel judicial and administrative proceedings). Requiring that complaints be presented to the Secretary in the first instance largely eliminates such concerns, and ensures the uniformity in oversight of the Nation's airports and airways that Congress intended.[9]

Finally, in providing for initial determination of the reasonableness of airport fees by the Secretary, the statutory scheme is in keeping with the usual concepts of the

[8] The courts have uniformly held that there is no private right of action under the AAIA. See, *e.g.*, *Massport*, 883 F.2d at 168-169; *Western Air Lines, Inc.* v. *Port Auth.*, 817 F.2d 222, 225 & n.4 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988); *Arrow Airways, Inc.* v. *Dade County*, 749 F.2d 1489, 1491 (11th Cir. 1985). The court of appeals here reached the same conclusion, Pet. App. 5a-6a, and petitioners have not sought review of that holding.

[9] Congress confirmed in connection with the *Massport* case that it expects the Secretary to rule on the lawfulness of airport fee structures. The Department of Transportation and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-457, 102 Stat. 2125 (1988), explicitly acknowledged the Secretary's role in determining whether an airport's landing fee structure is consistent with both the FAA and the AAIA, and established a date by which the Secretary was to issue a decision in *Massport*. 102 Stat. 2130-2131.

relative institutional roles of administrative agencies and the courts. The Secretary is better placed to evaluate the appropriateness of particular fees in light of both local conditions and national policy, and has a broader ability than would a court to regulate fees deemed unreasonable or unjustly discriminatory. See *Indianapolis Airport Auth.* v. *American Airlines, Inc.*, 733 F.2d 1262, 1270 (7th Cir. 1984). Moreover, because of his authority to withhold federal funds, the Secretary has significant leverage over airports under the AAIA—in addition to the enforcement authority provided under the AHTA—to achieve the establishment of reasonable rental charges and other fees.[10]

II. THE COURT OF APPEALS PROPERLY DECLINED TO REVIEW THE AIRPORT'S USER FEE STRUCTURE UNDER THE COMMERCE CLAUSE

Petitioners contend that the airport's user fees violate the "dormant" Commerce Clause, and that the court of appeals erred in declining to review respondents' fee structure on that basis. Because Congress has legislated on the specific subject of state airport user fees, in the context of a comprehensive federal scheme of airport and airway regulation, and has provided a federal administrative forum for the resolution of rate reasonableness issues aris-

[10] The considerations of administrative efficiency and expertise supporting the conclusion that Congress intended to commit initial rate reasonableness determinations to the Secretary are analogous to those taken into account by this Court in *Cort* v. *Ash*, *supra*, when it recognized that matters of corporation law are "traditionally relegated to state law, in an area basically the concern of the States." 422 U.S. at 78; see *id.* at 84-85. Rate reasonableness determinations of the sort at issue here are well suited, and typically committed, to expert administrative determination; it is correspondingly less appropriate to divert such issues from one administrative to many judicial forums in the absence of compelling evidence of congressional intent.

ing under that scheme, petitioners' claim is without merit. See also *Massport*, 883 F.2d at 174, 176; *Indianapolis*, 733 F.2d at 1266.

In *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946), the Court held that, when Congress has exercised its power under the Commerce Clause, a court is "not required to determine whether [a state] tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act." The Court reaffirmed that principle in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982):

> Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

More recently, the Court has emphasized that "congressional authorization of otherwise impermissible state interference with interstate commerce" must be "expressly stated" or otherwise "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 90-92 (1984); see also, *e.g.*, *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 802 (1992).

Petitioners contend (Br. 41) that Congress expressed no such unmistakable intent in the AHTA. That statute, however expressly contemplates the imposition of airport user fees on "aircraft operators" so long as they are "reasonable," 49 U.S.C. App. 1513(b); and the FAA, of which the AHTA is a part, provides explicitly for administrative (and, ultimately, judicial) review of fees that an aggrieved party claims violate that federal statutory standard.

49 U.S.C. App. 1482, 1486. Moreover, although the court of appeals correctly concluded that concession fees, which are not imposed on "aircraft operators," are not covered by the terms of the AHTA, Congress has unambiguously addressed the subject of such fees and rentals in the AAIA (see 49 U.S.C. App. 2210(a)(1), (9) and (12)), which petitioners agree (Br. 29 n.33) is "intimately connected" to, and must be read in conjunction with, the AHTA.[11] The comprehensive scheme of federal administrative regulation and oversight of local airport user fees set forth in these provisions leaves no doubt that Congress has affirmatively acted and "struck the balance it deems appropriate" in this area – not, to be sure, as to the details of any particular local tax or fee, but as to the standards to be applied in evaluating such exactions, and as to the forum in which they are, at least initially, to be evaluated.[12]

---

[11] The AAIA is more comprehensive in its coverage of fees than were the predecessor provisions in force at the time this Court decided *Evansville, supra.*

[12] Accordingly, we do not argue, as amicus American Trucking Associations, Inc., erroneously suggests (Br. 21), that federal law somehow authorizes the States to burden interstate commerce without further review. On the contrary, the federal aviation laws together demonstrate congressional intent to require local fees to be "reasonable" in much the same sense as would be required under judicial dormant Commerce Clause review, but to have issues of what fees are "reasonable" in this specialized context resolved in the first instance by the Secretary. See *Merrion*, 455 U.S. at 156 (eschewing Commerce Clause review where such judicial review "would duplicate the administrative review called for by the congressional scheme"). See also 14 C.F.R. 399.110(f) (stating Secretary's policy not to limit State's exercise of its proprietary powers, providing that "such exercise is reasonable, nondiscriminatory, *nonburdensome to interstate commerce*, and designed to accomplish a legitimate State objective" (emphasis added)). The issue here is not the availability of, but the forum for, federal review.

Amicus American Trucking Associations, Inc. (ATA), suggests (Br. 20-21) that the AAIA is merely a funding statute that establishes contractual commitments. As discussed above, however, the AAIA is much more than just a funding statute; it is a key element of the statutory framework that gives the Secretary primary responsibility for the oversight of virtually all aspects of the Nation's airways and airports, *including* the financing of future development through, among other sources, reasonable user fees.

The ATA also relies (*e.g.*, Br. 9, 17) on *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982), which undertook a Commerce Clause analysis of a State's attempt to limit out-of-state sales of electricity generated within the State, despite the existence of comprehensive general regulation of interstate power issues under the Federal Power Act. *New England Power*, however, involved a "standard 'nonpre-emption' clause" stating simply that federal law would not deprive a State of its lawful authority over the exportation of hydroelectric energy across state lines. 455 U.S. at 343; *id.* at 341. The corresponding aviation law provision is found in Section 105(b)(1) of the FAA, 49 U.S.C. App. 1305(b)(1), which states that federal preemption of laws relating to rates, routes, and services of air carriers does not otherwise limit state-owned or operated airports from exercising their proprietary powers and rights. But unlike *New England Power*, this case involves other, much more specific provisions of the AHTA and the AAIA, which embody affirmative congressional action in the area of airport user fees and revenue generation. This is not a case of federal silence. See *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 9-13 (1986) (international agreements establish government action and obviate dormant Commerce Clause analysis).

III. ALTHOUGH THE DETERMINATION OF REASONABLENESS SHOULD HAVE BEEN LEFT TO THE SECRETARY IN THE FIRST INSTANCE, THE COURT OF APPEALS' ANALYSIS ON THE MERITS IS GENERALLY CONSISTENT WITH FEDERAL LAW AND POLICY

Any discussion of the merits of a rate reasonableness dispute such as this one necessarily demonstrates Congress's wisdom in designing a statutory framework that relies on the administrative process, utilizing the Secretary's unique perspective and accumulated expertise, in making such determinations in the first instance. Because the Secretary has not had an opportunity to evaluate the parties' substantive positions in the course of an appropriate administrative proceeding, we express no definitive opinion on the ultimate merits of petitioners' claims. From a general review of the opinions and record in this case, however, it would appear that the lower courts' decisions on the merits comport with this Court's prior decisions and are generally consistent with federal statutory law and policy.

In *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972), this Court held that a state airport tax or fee that is "based on some fair approximation of use" and "is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred * * * will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." Congress responded to and limited *Evansville* through the prohibition of airport head taxes in 49 U.S.C. App. 1513(a) (Supp. III 1991). Although their position is somewhat unclear, petitioners appear to accept *Evansville*'s standard as the test by which the reasonableness of respondents' fees should be measured under Section 1513(b). Pet. Br. 22-23 & n.20; com-

pare *id.* at 27 n.29. In their view (Br. 23-40), respondents' fee structure fails that test because (i) petitioners are assertedly charged more than their fair share of the allocated costs for air operations, (ii) excessive revenues are generated, and (iii) the fees discriminate against petitioners in favor of "local" aviation.

A. Petitioners complain first (Br. 23-26) that concessionaires are allocated none of the airport's "air-operations" costs,[13] thus increasing the costs allocated to petitioners and therefore presumptively recoverable under 49 U.S.C. App. 1513(b). We note, however, that petitioners suggest no specific method for allocating to concessionaires the costs of activities (*i.e.*, air operations) in which they do not directly participate. Such practical questions would, of course, be an appropriate subject of administrative consideration in a proceeding before the Secretary, whose expertise would no doubt be helpful in determining the practicability of possible alternative cost accounting models. In any event, this Court in *Evansville* minimized the significance of the specific fee determination methodologies, and stressed that fees need only "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." 405 U.S. at 716, 717. The Court also recognized that an airport may lawfully distinguish among classes of users, including concessions, based on their differing uses of airport facilities. *Id.* at 718-719. Thus, the fact that respondents allocate the costs of air operations to petitioners and general aviation, but not directly to the concessions, presents no obvious conflict with *Evansville*.

---

[13] Petitioners do not define the term, but presumably they refer to the costs of operating runways, taxiways and so forth. See Br. 24-25 (distinguishing "terminal area" costs); Pet. App. 12a.

As to federal statutory law and policy, the provision on which petitioners rely states simply that the AHTA's prohibition of head taxes shall not prevent an airport from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(b). The statute does not define "reasonable," or address by its terms fees collected from users other than "aircraft operators." See Note, *supra*, 93 Yale L.J. at 324 n.35 (Section 1513(b) was not intended to "dictate how or from whom airport costs should be recovered"). Similarly, the AAIA provides that covered airports must be "available for public use on fair and reasonable terms and without unjust discrimination," and that air carriers may be charged only nondiscriminatory fees "directly and substantially related to providing air transportation." 49 U.S.C. App. 2210(a)(1).

Under these statutes, the Secretary's policy is that rates and charges should ordinarily correspond to the costs incurred in providing related facilities and services. Airports are given wide latitude, however, in selecting a particular rate methodology and fee structure. As long as an airport's charges to air carriers do not result in revenues that exceed by more than a reasonable margin the costs of servicing those carriers, the Secretary would normally sustain those charges as reasonable under federal law. See Federal Aviation Administration, *Airport Compliance Requirements*, Order No. 5190.6A §§ 4-13, 4-14, at 20-22 (Oct. 2, 1989) [hereinafter FAA Order No. 5190.6A]; 14 C.F.R. 399.110(f). Without, of course, prejudging the result of any proceeding that might be brought before the Secretary on the issue, there appears to be no indication in this record that the result should be different here.

B. Petitioners next argue (Br. 27-36) that respondents' fee methodology is unreasonable because it generates substantial "excess" revenues. The AHTA does not ad-

dress the question of accumulated surpluses. Under the AAIA, however, in order to obtain federal funding for airport development an airport operator must "maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible." 49 U.S.C. App. 2210(a)(9). Petitioners infer from this affirmative mandate an implied prohibition: that airports may charge "only those fees necessary" to break even. Br. 27; see *id.* at 29. Nothing in the AAIA, however, supports that strained interpretation of Section 2210(a)(9).[14]

The principal statutory limitation on the generation of airport surpluses is found instead in another provision of the AAIA, which requires "all revenues generated by the airport * * * [to] be expended for the capital or operating costs of the airport." 49 U.S.C. App. 2210(a)(12). By its terms, this provision applies to revenues from concessions as well as carriers and clearly contemplates the accumula-

[14] As support for their interpretation of Section 2210(a)(9), petitioners refer (Br. 27) to legislative history not of the AAIA, but of the *AHTA*, which suggests that that statute's prohibition on head taxes was intended to prevent financial windfalls. Similarly, petitioners seriously mischaracterize (Br. 28) a passage in *Evansville*, 405 U.S. at 720, as holding that airport fees are per se excessive if they "do more than meet * * * past, as well as current, deficits." The Court in *Evansville* merely pointed out that on the facts of that case the "excessiveness" inquiry was an easy one, because the airlines could not show that the airport's fees did more than account for past and present losses; its discussion in no way suggested a break-even test to define the upper limit of fee reasonableness. Finally, petitioners' reliance on *Indianapolis*, 733 F.2d at 1268, and *City & County of Denver*, 712 F. Supp. at 840, to support their "excess revenues" argument is also misplaced. Although both courts were aware of the AAIA, neither ruled on the significance of that statute to the question of accumulated surplus airport revenues. See 733 F.2d at 1265-1266; 712 F. Supp. at 839.

tion of funds for future capital outlays, but also suggests that revenues may not be accumulated indefinitely or in unlimited amounts. As a matter of federal policy, "[t]he progressive accumulation of substantial amounts of airport revenues may suggest an inquiry as to the reasonableness of user charges and fees." FAA Order No. 5190.6A, *supra*, § 4-20.c, at 31; see also 49 U.S.C. 2210(a)(1) (airport must be available on "fair and reasonable terms").

Once again, such inquiries are best undertaken by the Secretary, with the benefits of administrative procedure, a national perspective, and both practical and policy expertise. Conversely, they are ill suited to initial development and determination—as opposed to appellate review—in the courts. Petitioners have not requested that the Secretary undertake any inquiry into the allegedly excessive airport revenues accumulated by respondents. Without such an inquiry, however, it cannot be said that the airport has accumulated revenues so excessive as to render the user fees charged to petitioners unreasonable under federal law.

C. Last, petitioners contend (Br. 37-39) that respondents discriminate against them unlawfully by requiring them to bear all of their allocated costs, while charging "general aviation" (*i.e.*, noncommercial) users only 20% of the costs allocable to them.[15] In *Evansville*, however, this Court was concerned with discrimination between interstate and intrastate commerce and travel. While peti-

[15] Claims of "discrimination" in the charges assessed various classes of airport users are properly considered under the AAIA, rather than the AHTA, which is concerned with the "reasonableness" of airport user fees. See, *e.g.*, *New York* v. *United States*, 331 U.S. 284, 344-345 (1947) (drawing similar distinction). Compare Pet. Br. 38 n.48. The court of appeals held, however, that there is no private right of action under the AAIA, Pet. App. 5a-6a, and petitioners do not contest that holding.

tioners carefully characterize the "general aviation" users at issue in this case as "locally-based," they cite no evidence to suggest a legally significant equation between the commercial/noncommercial distinction drawn by respondents' fee structure (see Pet. App. 3a & n.2) and an interstate/intrastate distinction that might raise concerns under the AAIA or the Commerce Clause. See *Evansville*, 405 U.S. at 717, 718-719. Thus, petitioners have certainly not demonstrated, on this record, unlawful discrimination against interstate commerce.[16]

As to discrimination between airport users proscribed by the AAIA, the Secretary's principal concern is that a commercial air carrier not be assessed charges substantially higher either than its own properly allocated costs or than the fees charged to other commercial carriers making similar use of the airport. See 49 U.S.C. App. 2210(a)(1). In this case, the lower courts concluded that the fees charged petitioners approximate the costs related to their own use of the airport's facilities; although the charges levied on noncommercial users are lower than those users' allocated costs, the shortfall is made up out of concession revenues, rather than out of the fees charged petitioners. See Pet. App. 17a-20a, 37a. Moreover, noncommercial aviation's use of the airport is not necessarily similar to

[16] Amicus ATA admits this failure of proof (Br. 23 n.8), but suggests that respondents' fee structure might, depending on the answers to several unanswered factual questions, be unlawfully discriminatory. Br. 25-26. The ATA therefore apparently suggests remand to the district court for "properly focused factual development" of the case. Br. 22, 26. It does not, however, explain why petitioners should be given a second opportunity to prove their claims in this case. In any event, as we have argued, the appropriate vehicle for any challenge to respondents' fees, and for ensuring a "proper focus" in any further factual development, is an administrative proceeding before the Secretary, not remand to the district court.

that of the commercial airlines. See *Evansville*, 405 U.S. at 718-719. Thus, on the basis of this record, and again without prejudging the outcome of any later proceeding before the Secretary, petitioners do not appear to have demonstrated "unjust discrimination" under the applicable federal law. 49 U.S.C. App. 2210(a)(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

STEPHEN H. KAPLAN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
Department of Transportation

JOHN H. CASSADY
Deputy Chief Counsel

BARRY L. MOLAR
Attorney
Federal Aviation Administration

FRANK W. HUNGER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

WILLIAM KANTER
CHRISTINE N. KOHL
Attorneys

SEPTEMBER 1993

APPENDIX

The Anti-Head Tax Act, 49 U.S.C. App. 1513 (1988 & Supp. III 1991), provides in pertinent part as follows:

§ 1513. State taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof * * *) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (e) of this section * * *.

(b) Permissible State taxes and fees

Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof * * *) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof * * *) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

* * * * *

(e) Authority for imposition of passenger facility charges

(1) In General

Subject to the provisions of this subsection, the Secretary may grant a public agency which

controls a commercial service airport authority to impose a fee of $1.00, $2.00, or $3.00 for each paying passenger of an air carrier enplaned at such airport to finance eligible airport-related projects to be carried out in connection with such airport or any other airport which such agency controls. For purposes of this subsection, financing an eligible airport-related project includes making payments for debt service on bonds and other indebtedness incurred to carry out such project.

(2) Use of revenues and relationship between fees and revenues

The Secretary may grant a public agency which controls a commercial service airport authority to impose a fee under this subsection to finance specific projects only if the Secretary finds, on the basis of an application submitted for such authority—

(A) that the amount and duration of the proposed fee will result in revenues (including interest and other returns on such revenues) which do not exceed amounts necessary to finance the specific projects; and

(B) that each of the specific projects is an eligible airport-related project * * *.

* * * * *

(11) Application process

* * * * *

(C) Opportunity for consultation

Before submission of an application under this paragraph, a public agency shall provide reasonable notice to, and an opportunity for consultation with, air carriers operating at the airport. * * *

* * * * *

(D) Notice and opportunity for comment

After receiving an application under this paragraph, the Secretary shall provide notice and an opportunity for comment by air carriers and other interested persons concerning such application.

(E) Approval

A fee may only be imposed pursuant to this subsection if the Secretary approves an application granting authority for the imposition of such fee. Not later than 120 days after the date of receipt of such an application, the Secretary shall make a final decision regarding approval of such application.

(12) Recordkeeping and audits

* * * * *

(C) Set-off

If the Secretary determines that a fee imposed pursuant to this subsection is excessive or that the revenues derived from such fee are not being used in accordance with this subsection, the Secretary may set

off such amounts as may be necessary to ensure compliance with this subsection against amounts otherwise payable to the public agency under the Airport and Airway Improvement Act of 1982 [49 U.S.C. App. 2201 *et seq.*].

The Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2210, provides in pertinent part as follows:

§ 2210. Project sponsorship

(a) Sponsorship

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that –

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and signatory carriers and nonsignatory carriers, and such classification or status as tenant or signatory shall not be unreasonably with-

held by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status, and (B) each fixed-based operator at any airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities, and (C) each air carrier using such airport shall have the right to service itself or to use any fixed-base[d] operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport;

* * * * *

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection * * *;

* * * * *

(12) all revenues generated by the airport, if it is a public airport, and any local taxes on aviation fuel * * * will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; * * *

* * * * *

The Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*, provides in pertinent part as follows:

§ 1354. Other powers and duties of Secretary of Transportation

(a) Generally

The Secretary of Transportation is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this chapter, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this chapter.

* * * * *

§ 1482. Complaints to and investigations by Secretary of Transportation and Board

(a) Filing of complaints; complaints against members of the Armed Forces

Any person may file with the Secretary of Transportation or the [Civil Aeronautics] Board,* as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary of Transportation or the Board to investigate the matters complained of. Whenever the Secretary of Transportation or the Board is of the opinion

---

* The Civil Aeronautics Board has been abolished, and its functions under these provisions transferred to the Secretary. See 49 U.S.C. App. 1551(b)(1)(E).

that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. * * *

* * * * *

(c) Entry of orders for compliance with chapter

If the Secretary of Transportation or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Secretary of Transportation or the Board shall, subject to section 1502(a) of this Appendix [relating to international agreements], issue an appropriate order to compel such person to comply therewith.

* * * * *

§ 1486. Judicial review

(a) Orders subject to review; petition for review

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this Appendix, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(d) Power of court

Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. Upon good cause shown and after reasonable notice to the Board or Secretary of Transportation interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) Conclusiveness of findings of fact; objections

The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) Review by Supreme Court

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28.

§ 1487. Judicial enforcement; jurisdiction; application; costs

(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any

certificate or permit issued under this chapter, the Board or Secretary of Transportation, as the case may be, their duly authorized agents, or, in the case of a violation of section 1514 of this Appendix [relating to suspension of air services by the President], the Attorney General, or, in the case of a violation of section 1371(a) of this Appendix [relating to certificates of public convenience and necessity], any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition or limitation, and requiring their obedience thereto.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1993 — 342-479:86022